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Sarah S. Condie nka Sarah S. Seals v. David C. Condie : Reply Brief

Utah Court of Appeals

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Scott B. Mitchell; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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SARAH S. CONDIE nka SARAH S. SEALS,	*	**APPELLANT'S REPLY BRIEF**
Petitioner/Appellant,	*	
vs.	*	
DAVID C. CONDIE,	*	Case No. 20050450-CA
Respondent/Appellee.	*	

* * * *

PETITIONER'S APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE RANDALL SKANCHY PRESIDING

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PUBLISHED DECISION REQUESTED

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ARGUMENT

I. THE BANKRUPTCY COURT DID NOT DEEM MS. SEALS' ADVERSARY PROCEEDING TO BE "WHOLLY UNNECESSARY." IN POINT OF FACT, THE BANKRUPTCY COURT GRANTED SUMMARY JUDGMENT IN MS. SEALS' FAVOR.

In his statement of the "Nature of the Case," Mr. Condie asserts that "[t]he bankruptcy court at the time of those proceedings in its' [sic] own words, deemed the adversarial proceeding to be to be [sic], 'wholly unnecessary.'"[1] Mr. Condie also makes essentially the same assertion in several other places throughout his Brief. It is clearly false.

The part of the record to which Mr. Condie cites in support of his assertion (i.e., R. 424) is Judge Skanchy's January 31, 2005 Order on Petitioner's Motion for Judgment and for a Finding of Contempt. It is not the bankruptcy court's own words, as Mr. Condie alleges, but Judge Skanchy's misinterpretation of a statement made by the bankruptcy judge taken out of context. In paragraph 3(b) of his Order, Judge Skanchy mistakenly

> "notes that the Hopkinsville obligation was satisfied in April 2001, thus making any subsequent proceedings in bankruptcy wholly unnecessary as is underscored by the Bankruptcy Court's own musings after listening to

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[1]Appellee's Brief at p.3.

> the parties' argument in Seals' Motion for Partial Summary Judgment that '...under the circumstances I can't see that there is any dispute.'"

(R. 424).

Judge Skanchy simply misinterpreted the bankruptcy judge's statement. The bankruptcy judge's statement that "under the circumstances I can't see that there is any dispute"[2] was not intended to signify that Ms. Seals' adversary proceeding was "unnecessary." To the contrary, it was clearly intended to signify that Ms. Seals was entitled to summary judgment because, based upon the undisputed facts, Ms. Seals was entitled to prevail as a matter of law. *See* Rule 7056 of the Federal Rules of Bankruptcy Procedure. After listening to Mr. Condie acknowledge in open court that he did not dispute the material facts upon which Ms. Seals' nondischargeability claim was based, but that he had some unintelligible concern that "they're trying to look for some way to come back in State Court somehow," the bankruptcy judge ruled in Ms. Seals' favor as follows:

> The Court: All right. Well, I'm not sure that we've reached a meeting of the minds here but under the circumstances I can't see that there is any dispute. **There is certainly no contested issue of fact and, therefore, as a matter of law I'm going to find that**

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[2]R. 457.

> **Paragraph 14 [i.e., the hold harmless provision of the Decree of Divorce] represents an obligation that [Mr. Condie] owed as of the date of filing [of his bankruptcy petition] to [Ms. Seals], and that it arose in the context of the divorce proceeding and is nondischargeable under Section 523(a)(15).**

(R.458-457)(emphasis added).

In short, it is clear that Judge Skanchy misinterpreted the bankruptcy court's "musings." Ms. Seals fully prevailed on her claim in bankruptcy court because there was no dispute with respect to the material facts and she was entitled to the relief which she requested as a matter of law. It is inconceivable that the bankruptcy court would have granted Ms. Seals summary judgment if it had deemed her adversary proceeding to be unnecessary.[3]

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[3]In part IV of his Argument, Mr. Condie also argues that Ms. Seals' adversary proceeding was unnecessary because she did not own the real property subject to the Hopkinsville mortgage at the time and Hopkinsville Federal Savings Bank was not aggressively pursuing its collection action against Ms. Seals. This argument is specious. Regardless of the ownership of the property subject to the mortgage, there is no question that until it was paid off in April 2004 Ms. Seals remained fully liable for payment of the promissory note.

Likewise specious is Mr. Condie's suggestion that Ms. Seals had nothing to worry about because he arranged for his friend, Brian Steffensen, to become the holder of the note. Given the animosity between the parties, that suggestion is almost comical. Had Ms. Seals not prosecuted her non-dischargeability action in bankruptcy court, Mr. Steffensen or any subsequent holder could have pursued Ms. Seals for payment of the note and Ms. Seals would have had no recourse against Mr. Condie under the hold harmless provision of the Decree of Divorce because his obligation would have been discharged. *See* 11 U.S.C. § 523(c).

II. THE BANKRUPTCY COURT DOES NOT HAVE STATUTORY AUTHORITY TO AWARD ATTORNEY FEES IN CONNECTION WITH § 523(a)(15) LITIGATION.

In point I of his Argument, Mr. Condie first contends that 11 U.S.C. § 105(a) provided the bankruptcy court with statutory authority to award Ms. Seals' attorney fees in connection with her adversary proceeding. According to Mr. Condie, § 105(a) is "commonly used to make an award of attorney fees in bankruptcy cases."[4] It is significant that Mr. Condie fails to cite to any authority which would support this proposition.[5] Ms. Seals' own research reveals that there is no such authority. While § 105(a) authorizes the bankruptcy court to award sanctions and attorney fees for violations of the § 524[6] discharge injunction, *e.g.*, *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000), *cert. denied*, 532 U.S. 1048, 121 S.Ct. 2016, 149 L.Ed. 2d 1018 (2001), and to award attorney fees as a

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[4]Appellee's Brief at p. 10.

[5]Ms. Seals believes that it would be appropriate for the Court to find that Mr. Condie's Brief fails to comply with Rule 24(a)(9) of the Utah Rules of Appellate Procedure. *See State v. Thomas*, 961 P.2d 299 (Utah Ct. App. 1996)(failure to cite to pertinent authority renders an issue inadequately briefed "when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court").

[6]11 U.S.C. § 524.

sanction for bad faith conduct, *In re Nichols*, 221 B.R. 275, 279 (Bkrtcy. N.D.Okla 1998), there is not a single case in which it has been used as authority for an award of attorney fees in connection with § 523(a)(15)[7] litigation.

Mr. Condie next attempts to distinguish Ms. Seals' adversary proceeding from *Dennison v. Hammond (In re Hammond)*, 236 B.R. 751, 769 (Bankr. D.Ut. 1998), as follows:

> The distinction between Dennison and the present case is that the ex-wife in Dennison was an actual creditor while Ms. Seals, in the present case, did not even have a cognizable claim.[8]

Mr. Condie's contention that Ms. Seals "did not even have a cognizable claim" is frivolous and is asserted in bad faith without any factual or legal basis. It is inconceivable that the bankruptcy court would have granted Ms. Seals summary judgment on a claim which was not cognizable. At the risk of redundancy, the bankruptcy court specifically recognized and granted summary judgment on Ms. Seals' § 523(a)(15) claim. (R. 263).

Mr. Condie also misrepresents that "[t]he Bankruptcy Court acknowledged that the Hopkinsville obligation had been satisfied in April of 2001..." There is absolutely nothing

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[7]11 U.S.C. § 523(a)(15).

[8]Appellee's Brief at p.10.

in the record or elsewhere which would even remotely support this representation and Mr. Condie fails to provide any support for this representation in his Brief.

Likewise without merit is Ms. Condie's contention that Rule 7054 of the Federal Rules of Bankruptcy Procedure provided a basis upon which the bankruptcy court might have awarded attorney fees to Ms. Seals. Under Rule 7054 the bankruptcy court "may allow costs to the prevailing party...," however, attorney fees are generally not available. *E.g., In re Nichols, supra,* 221 B.R. at 280, n. 6 (citing *Fleishmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 717-718, 87 S.Ct. 1404, 1406-1407, 18 L.Ed.2d 475 (1967)). In *Nichols,* the court noted the "exception to the general rule if provided for under a statute or under Rule 9011." *Id.* (citing 10 King et al., Collier on Bankruptcy ¶ 7054.05 (15th ed. 1998)). In other words, there is nothing in Rule 7054 which would authorize an award of attorney fees except in those exceptional circumstances in which they are otherwise authorized under the "American Rule."

It is noteworthy that the author of the *Dennison* opinion was the Honorable Judith A. Boulden, the very judge

who presided over Ms. Seals' adversary proceeding against Mr. Condie. In *Dennison*, a case which is directly on point, Judge Boulden specifically denied the non-debtor spouse's request for attorney fees because she could find "no case law, contractual or statutory basis for an award of attorney fees incurred in this [§ 523(a)(15)] proceeding..." *Dennison, supra*, 236 B.R. at 769. Judge Boulden was certainly aware of § 105(a) and Rule 7054 when she ruled that there is no statutory basis for an award of attorney fees in § 523(a)(15) litigation.

III. THE TRIAL COURT DID NOT DENY MS. SEALS' REQUEST FOR ATTORNEY FEES BASED UPON "MR. CONDIE'S INABILITY TO PAY."

In point II of his Argument, Mr. Condie asserts that the trial court's denial of Ms. Seals' request for attorney fees was based in part on its finding of "Mr. Condie's inability to pay."[9] That is clearly not the case and, once again, Mr. Condie fails to provide any meaningful support for his assertion. Instead, he cites to the trial court's ruling on the issue of Mr. Condie's contempt for failing to pay child support:

The Court finds that there is no basis for a finding of

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[9]Appellee's Brief at p. 15.

> contempt, as the evidence concerning Condie's financial condition during the periods in question and the payments on child support he did make suggest that Condie was not intentionally or deliberately avoiding or neglecting his obligation to his children.

(R. 425).

The evidence concerning Mr. Condie's "financial condition during the periods in question" to which the trial court refers is Mr. Condie's testimony that his income fell from $80,400 in 2001 to $6,402 in 2003. (R. 550 at page 112, lines 20-21). However, the period in question for purposes of an award of attorney fees was the date of the December 2004 hearing. Mr. Condie testified that in December 2004 he was receiving a monthly salary of $6,500, i.e., $78,000 annually. (R. 550 at page 115, line 6).

In short, while the trial court's ruling on the issue of contempt was based in part on Mr. Condie's "financial condition during the periods in question," its ruling on Ms. Seals' request for an award of the attorney fees which she was forced to incur in connection with Mr. Condie's bankruptcy proceedings was based entirely on its conclusions of law: (1) that the bankruptcy proceedings were the time and place for an award of attorney fees; and (2) that the "Hopkinsville obligation was satisfied in April 2001, thus

making any subsequent proceedings in bankruptcy wholly unnecessary..." (R. 425-424).

IV. MS. SEALS HAS SATISFIED ANY OBLIGATION WHICH SHE MAY HAVE HAD TO MARSHAL THE EVIDENCE.

In point III of his Argument, Mr. Condie contends that Ms. Seals has failed to marshal the evidence.[10] Unfortunately, Mr. Condie fails to provide any analysis with respect to this contention. Nor does he point to any evidence in the record which he claims Ms. Seals has failed to marshal. In fact, Mr. Condie does not even identify the finding of fact with respect to which he contends Ms. Seals failed to satisfy the marshaling requirement.

In her Opening Brief, as a precaution, Ms. Seals marshaled the evidence[11] with respect to what she believes is actually a conclusion of law, but which she was concerned might be characterized as a finding of fact, i.e., the trial court's determination that "the Hopkinsville obligation was satisfied in April 2001, thus making any subsequent proceedings in bankruptcy wholly unnecessary..." (R. 424). In doing so, Ms. Seals respectfully submits that she first marshaled all of the evidence which supports the trial

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[10]Appellee's Brief at pp. 15-16.

[11]Appellant's Opening Brief at pp. 17-18.

court's determination and then demonstrated that despite this evidence the determination is so lacking in support as to be "against the clear weight of evidence." *See Crockett v. Crockett*, 836 P.2d 818, 820 (Utah Ct. App. 1992).

Accordingly, Ms. Seals submits that she has satisfied any obligation which she may have had to marshal the evidence.

V. MS. SEALS' APPEAL IS WELL GROUNDED IN FACT AND IS WARRANTED BY EXISTING LAW.

Finally, Mr. Condie contends that he is entitled to an award of attorney fees pursuant to Rule 33 of the Utah Rules of Appellate Procedure "based on Ms. Seals' frivolous appeal."[12] According to Mr. Condie, "Ms. Seals' failure to marshal the evidence, along with the lack of legal basis for her appeal amounts to a frivolous claim."[13] Ms. Seals respectfully submits that Mr. Condie's contention is unfounded.

As set forth above, Ms. Seals has in fact satisfied any obligation which she may have had to marshal the evidence. Further, even if Ms. Seals' marshaling of the evidence is in some manner deficient, Mr. Condie fails to cite to any

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[12]Appellee's Brief at p. 20.

[13]Appellee's Brief at p. 20.

authority which would support the proposition that failing to satisfy the marshaling requirement renders an appeal frivolous. Nor does Mr. Condie provide any analysis or citation to authority with respect to his contention that Ms. Seals' appeal is without a legal basis.

Thus, Ms. Seals respectfully submits that Mr. Condie has done nothing to suggest either that: (1) the facts set forth in support of Ms. Seals' appeal are less than well grounded in the record; or (2) that the legal authority to which Ms. Seals has cited in her Briefs fails to provide sufficient warrant for her appeal under existing law. Accordingly, Mr. Condie's contention may itself be in violation of Rules 24(a)(9) and 33, URAP, and should be rejected.

CONCLUSION

Based on the foregoing, Ms. Seals respectfully requests that the trial court's Order and Judgment be reversed to the extent that it denies Ms. Seals' request for a judgment for the attorney fees incurred in connection with Mr. Condie's bankruptcy proceedings and that this matter be remanded to the trial court for further proceedings. Ms. Seals also requests an award of attorney fees incurred in prosecuting

this appeal in accordance with Utah Code Ann. § 30-3-3(2).

DATED this 9th day of December 2005.

Scott B. Mitchell
Attorney for Appellant

MAILING CERTIFICATE

Undersigned certifies that two copies of the foregoing were mailed this 9th day of December 2004 via first class U.S. Mail, postage prepaid, to the following:

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